



October 15, 2002

Ms. Trudi Dill  
Deputy City Attorney  
City of Temple  
Municipal Building  
Temple, Texas 76501

OR2002-5842

Dear Ms. Dill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170634.

The Temple Police Department (the "department") received a request for copies of information pertaining to an in-custody suicide. You state that you have made some responsive information available to the requestor. You also state that you do not maintain the requested autopsy report.<sup>1</sup> You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.108, 552.115, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that section 552.301(e) of the Government Code requires that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the written request for information. *See* Gov't Code § 552.301(e)(1)(B). To date, the department has not submitted a copy of the written request to us for our review. Therefore,

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

the department failed to request a decision from our office in accordance with section 552.301 of the Government Code.

Because the department failed to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the requested information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the department claims that the requested information is excepted from disclosure pursuant to section 552.108 of the Government Code, we note that it has not demonstrated a compelling interest under that exception that would allow the requested information to be withheld from disclosure. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108 in certain circumstances). However, because the remaining exceptions to disclosure claimed by the department constitute compelling interests that are sufficient to overcome the presumption that the requested information is public, we will address those particular claims.

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>2</sup> Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of your arguments and the information at issue, we agree that some of the information which we have marked constitutes mental health records that are subject to chapter 611.

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information protected from disclosure by other statutes.

Accordingly, we conclude that the department may only disclose the marked information that is subject to chapter 611 as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

You also claim that portions of the information at issue are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We note that when a patient is deceased, as here, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Accordingly, we conclude that the information that we have marked pursuant to the MPA may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991). Absent the applicability of an MPA access provision, we conclude that the department must withhold this marked information from disclosure pursuant to the MPA.

You also claim that portions of two custodial death reports contained within the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b), in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). You state that the department has made section one of both reports available to the requestor. Because sections two through five of the reports, as well as attachments to the reports, are deemed confidential under article 49.18(b), we conclude that the department must withhold this particular information associated with both reports from disclosure pursuant to section 552.101 of the Government Code.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. We note that criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Federal regulations prohibit the release of CHRI maintained in state and local

CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. See Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. See *id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). The definition of CHRI does not include driving history record information maintained by the department under Subchapter C of Chapter 521 of the Transportation Code. Based on our review of your arguments and the information at issue, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. See *id.*; see also Gov't Code § 411.106(b), .082(2) (defining criminal history record information).

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure pursuant to the common-law right to privacy. Information is protected by the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); see also Open Records Decision No. 611 at 1 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included, for example, information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683.

In addition, this office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues). Based on our review of your arguments and the information at issue, we conclude that the department must withhold from disclosure the medical information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You claim that a portion of the information at issue is excepted from disclosure pursuant to section 552.115 of the Government Code. We note that birth or death records held by the bureau of vital statistics or local registration officials are excepted from disclosure under section 552.115. However, because the death certificate in this case is not held by the bureau of vital statistics or local registration officials, we find that section 552.115 is inapplicable in this instance. Accordingly, we conclude that the department may not withhold from disclosure any portion of the information at issue pursuant to section 552.115 of the Government Code.

Finally, you claim that portions of the information at issue are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state.

In summary, the department may only disclose the marked information that is subject to chapter 611 as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. Absent the applicability of an MPA access provision, the department must withhold from disclosure the information that we have marked pursuant to the MPA. The department must withhold from disclosure sections two through five of the submitted custodial death reports, as well as the attachments to the reports, pursuant to section 552.101 of the Government Code in conjunction with article 49.18(b) of the Code of Criminal Procedure. The department must withhold from disclosure the information that we have marked pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. The department must withhold from disclosure the medical information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department must withhold from disclosure the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state. The department must release to the requestor the entirety of the remaining submitted information, to include the submitted videotape and audiotape.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/RJB/seg

Ref: ID# 170634

Enc. Marked documents, videotape, audiotape

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